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No. 01-

IN THE

Supreme Court of the United States

EDWARD OTTE,

Petitioner,

v.

JERRY LIVINGSTON, as Attorney in Fact and Next Friend of ROGER LEE LIVINGSTON, and ROGER LEE LIVINGSTON, individually,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

CHRISTINE CASINGAL DALY
BRADLEY JOHNSON LAW FIRM, P.A.
225 East Park Avenue
Post Office Box 1260
Lake Wales, FL 33859-1260
(863) 676-1423

MONTERREY CAMPBELL
HANK B. CAMPBELL*
GRAY HARRIS ROBINSON
LANE TROHN
One Lake Morton Drive
Post Office Box 3
Lakeland, FL 33802-0003
(863) 284-2200

Attorneys for Petitioner

* *Counsel of Record*

171566

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

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QUESTIONS PRESENTED FOR REVIEW

1. Certiorari should be granted to clarify whether a law enforcement officer, sued in his individual capacity pursuant to Section 1983 for an alleged use of excessive force, possessed qualified immunity as a matter of law in light of this Court's recent decision in *Saucier v. Katz*, 533 U.S. 194, 121 S. Ct. 2151, 150 L. Ed. 2d 272 (2001).

2. Certiorari should be granted because the evidence presented at trial failed to support Respondent's state law battery claim, and therefore, the district court should have granted Petitioner's Motion for Judgment as a Matter of Law as to this issue.

PARTIES TO THE PROCEEDING

Petitioner, EDWARD OTTE, was, at all material times hereto, a resident of Polk County, Florida. Petitioner was a Defendant in the lower court proceedings, and the Defendant/ Appellee/Cross-Appellant before the United States Court of Appeals for the Eleventh Circuit.

Respondents, JERRY LIVINGSTON, as Attorney in Fact and Next Friend of ROGER LEE LIVINGSTON, and ROGER LEE LIVINGSTON, individually, were, at all material times hereto, residents of Polk County, Florida. Respondents were the Plaintiffs in the lower court proceedings, and the Plaintiffs/Appellants/Cross-Appellees before the United States Court of Appeals for the Eleventh Circuit.

Lawrence W. Crow, Jr., Sheriff of Polk County, in his official capacity, was a Defendant in the lower court proceedings and the Defendant/Appellee/Cross-Appellant before the United States Court of Appeals for the Eleventh Circuit. Sheriff Crow has no interest in the outcome of this petition.

There are no other parties to this action.

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On July 30, 2001, the United States Court of Appeals for the Eleventh Circuit issued its opinion, affirming in part and reversing in part the decision of the District Court. By order of the Eleventh Circuit, the decision has not been published.

STATEMENT OF JURISDICTION

Petitioner seeks review of the opinion of the United States Court of Appeals for the Eleventh Circuit entered July 30, 2001. In pertinent part, the Eleventh Circuit's opinion reversed and remanded the lower court's entry of judgment as a matter of law in favor of Petitioner as to Respondent's Section 1983 claim on the basis of qualified immunity. The Eleventh Circuit's opinion also affirmed the lower court's denial of Petitioner's motion for judgment as a matter of law as to Respondent's state law battery claim.

Petitioner previously filed a Suggestion for Rehearing En Banc and/or Petition for Rehearing, which the Eleventh Circuit Court of Appeals denied by Order dated October 12, 2001.

Petitioner invokes the certiorari jurisdiction conferred on this Court by 28 U.S.C. § 1254(1).

STATUTE AND CONSTITUTIONAL PROVISION INVOLVED

42 U.S.C. § 1983 provides as follows:

> Civil action for deprivation of rights
>
> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or

> causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Section 768.28(9)(a), Florida Statutes (1995), states as follows:

> No officer, employee, or agent of the state or any of its subdivisions shall be held personally liable in tort or named as a party defendant in any action for any injury or damage suffered as a result of any act, event, or omission of action in the scope of her or his employment or function, unless such officer, employee, or agent acted in bad faith or with malicious purpose or in a manner exhibiting wanton and willful disregard of human rights, safety, or property. However, such officer, employee, or agent shall be considered an adverse witness in a tort action for any injury or damage suffered as a result of any act, event, or omission of action in the scope of her or his employment or function. The exclusive remedy for injury or damage suffered as a result of an act, event, or omission of an officer, employee,

> or agent of the state or any of its subdivisions or constitutional officers shall be by action against the government entity, or the head of such entity in her or his official capacity, or the constittional officer of which the officer, employee, or agent is an employee, unless such act or omission was committed in bad faith or with malicious purpose or in a manner exhibiting wanton and willful disregard of human rights, safety, or property. The state or its subdivisions shall not be liable in tort for the acts or omissions of an officer, employee, or agent committed while acting outside the course and scope of her or his employment or committed in bad faith or with malicious purpose or in a manner exhibiting wanton and willful disregard of human rights, safety, or property.

Amendment XIV of the United States Constitution, states in pertinent part as follows:

> *Section 1.* All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any persons within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

This case arises out of an arrest and subsequent incarceration which took place on February 27, 1996. On that date, Respondent, Roger Livingston, a resident at the Meadows at

Garden Grove, an assisted living facility located in Winter Haven, Florida, was allowed to wander away from the facility into a department store nearby.[1] At the time, Mr. Livingston was mentally disabled, having suffered a series of strokes, one of which occurred the month immediately preceding the incident in question. While in the department store, Mr. Livingston proceeded to follow a female customer around the store, subsequently accosting her while she shopped. This incident prompted the store manager to summon the aid of the Polk County Sheriff's Office. While awaiting their arrival, the store manager held Mr. Livingston in an arm lock until Officers Dan Cash and Randall Cuttell could respond to the scene.

Mr. Livingston struggled with Deputy Cash and Lieutenant Cuttell when the officers attempted to restrain him. At one point, Mr. Livingston attempted to bite Lieutenant Cuttell. Deputy Cash testified that he believed he had a "drunk" on his hands because Mr. Livingston had urinated on himself. Because Livingston had resisted the officers' attempts to place handcuffs upon him and because the officers had to use physical force to apprehend Mr. Livingston, Deputy Cash made the decision to take Mr. Livingston to the county jail. The officers then placed Mr. Livingston, who was still struggling at the time, in the patrol car and transported him to the jail. While in the car, Mr. Livingston urinated on himself, on his clothes, and in the car.

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1. Although the Meadows is an assisted living facility, Respondent's family indicated that they did not want Respondent outside by himself. Respondent had wandered away from the facility on a prior occasion, necessitating that the police return him to the facility. Respondents previously filed suit against the Meadows, alleging that due to the Meadows' negligence, Respondent wandered away from the facility, thereby leading to his arrest and subsequent incarceration. Respondents subsequently settled with the Meadows.

After being booked into the jail, showered, and given a prison uniform to wear, Mr. Livingston, pursuant to his family's request, remained overnight in the jail.[2] The next morning, February 28, 1996, Petitioner, Deputy Edward Otte, came on duty. Because Mr. Livingston had again urinated on himself and all over his cell, Deputy Otte made the decision to attempt to clean Mr. Livingston's cell and give Mr. Livingston a clean uniform to wear. Deputy Otte approached the cell with Deputy Ivankovich. At the time, Deputy Otte had not been aware of Mr. Livingston's mental disability. Deputy Otte testified that he thought Mr. Livingston may have been drunk.

Upon approaching the cell, Deputy Otte ordered Deputy Ivankovich to open the door and repeatedly ordered Mr. Livingston to stand back from the door. Deputy Ivankovich testified that Mr. Livingston appeared to be "agitated," "incoherent," and "combatative" at the time. Once Deputy Otte and Deputy Ivankovich opened the door and entered the cell, Mr. Livingston proceeded to close in on Deputy Otte. In light of Mr. Livingston's actions, Deputy Otte testified that he believed that Mr. Livingston intended either to strike him or attempt an escape. In an effort to stop and/or subdue him, Deputy Otte sprayed Mr. Livingston with a chemical agent. Mr. Livingston, however, continued to converge on Deputy Otte, who then used a "straight-arm-take-down" maneuver designed to take Mr. Livingston down to the floor. Deputy Ivankovich testified that he also attempted to grab Mr. Livingston by the arm, but because of Mr. Livingston's strength and size,

2. The evidence presented at trial revealed that the Sheriff's Office wished to release Respondent on his on recognizance. However, Respondent's brother, Jerry Livingston, refused on the grounds that he was not able to take care of him, and because the Meadows would not take Respondent back, Jerry Livingston needed to make other arrangements for his brother.

Mr. Livingston was able to sling his arm away from Deputy Ivankovich, leaving Deputy Otte alone with Mr. Livingston on the floor.

Once on the floor, Deputy Otte ordered Respondent to remain on the floor. Contrary to these orders, however, Mr. Livingston began to get back up and continued to resist Deputy Otte. Believing that he would be overpowered by Mr. Livingston, who was six feet two inches tall, 193 pounds, and considerably larger than Deputy Otte, Deputy Otte attempted to apply two knee strikes to the common peroneal, a nerve group on the outer side of the thigh, in order to maintain control. Because of the urine on the floor, and the urine all over Mr. Livingston's body, however, the knee strikes apparently missed their intended target and impacted the side of Mr. Livingston's torso instead. At trial, Deputy Ivankovich specifically testified that Mr. Livingston was still moving, yelling, and struggling while Deputy Otte had him on the floor. In his incident report, Deputy Ivankovich further stated that Mr. Livingston kept resisting the officers prior to Deputy Otte's application of the knee strikes on Mr. Livingston's side.

After Respondent stopped resisting, Mr. Livingston was handcuffed and a facility nurse examined him. Mr. Livingston was subsequently cleaned up and placed in a holding cell pending transfer to a crisis support unit. Upon examination by medical staff, Mr. Livingston was observed to have a small abrasion on his chin. Dr. Kennedy, who evaluated Mr. Livingston while at the jail, ordered Mr. Livingston to be institutionalized pursuant to the Baker Act. Mr. Livingston was subsequently taken to Peace River Center, a facility located in Polk County, Florida, and upon evaluation, was noted to have cracked ribs, but no other serious trauma or bruising.

With regard to the use of the knee strikes, Respondent's expert witness, James D. White, testified that there was no question that Mr. Livingston had been struggling at the time of their application. He also agreed that the use of force standard or continuum governing the officers was only a guideline and allowed for the discretion of the officer in evaluating the totality of the circumstances necessitating the use of force. Mr. White further agreed that Petitioner's use of force was necessary under the circumstances, although he thought a Level 3, as opposed to a Level 4 use of force may have been more appropriate. In any event, Mr. White never testified that Deputy Otte went too far. Petitioner's expert, David M. Bogard, likewise testified that Deputy Otte's actions complied with the General Orders of the Sheriff's Office relating to the use of the chemical agent, as well as the application of the knee strikes in question.

Based upon these allegations, Respondent filed a multi-count complaint, alleging with respect to Petitioner a claim brought pursuant to Section 1983 for an alleged use of excessive force, and a state law battery claim based upon the same set of facts. The case proceeded to trial, and upon Petitioner's motion, the district court granted Petitioner judgment as a matter of law with respect to Respondent's Section 1983 claim based upon the doctrine of qualified immunity. In so ruling, the district court noted as follows:

> Defendants assert that Plaintiffs have failed to establish that the actions of Otte violated any clearly established, then-existing law. Plaintiffs claim that a factual issue exists regarding the actual circumstances surrounding Otte's actions and thus, judgment as a matter of law in favor of Otte on the issue of qualified immunity is inappropriate. Plaintiffs further assert that a sheriff's deputy and at least one expert testified that Otte used excessive force against Livingston.

Plaintiffs' argument falls short. First, although the Court recognizes that it must view the facts in the light most favorable to Plaintiffs, *the facts clearly establish that after Otte executed the take down maneuver on Livingston and at the time Otte administered the knee strikes to Livingston, Livingston continued to move, resist, or struggle against Otte. Even Plaintiffs' expert, professor James White, testified that he believed Livingston continued to resist Otte after the take down.* The only evidence that indicates otherwise is the testimony of former sheriff's deputy Mark Ivankovich ("Ivankovich"). Ivankovich testified that Livingston "was just on his hands and knees and yelling." *However, throughout the remainder of his testimony Ivankovich testified that he didn't think that Livingston "was resisting that much," that Livingston "was trying to push up a little," and that Livingston "was struggling." Additionally, the report made by Ivankovich shortly after the incident stated that Livingston was still resisting when he was on the ground and Ivankovich stated the same thing during his deposition.* Thus, taken as a whole, Ivankovich's testimony does not indicate that Livingston was completely non-resistant at the time Otte administered the knee strikes. *Consequently, contrary to Plaintiff's assertions, no question of fact exists as to whether or not Livingston continued to struggle after the take down by Otte.*

Given the fact that Livingston continued to struggle against Otte after the take down, Plaintiffs have not presented to the Court nor can the Court find any clearly established, then-existing law that Otte

> violated by administering the knee strikes to Livingston. If Otte did not violate clearly established case law he is entitled to qualified immunity.

(Emphasis added). The battery claim proceeded to the jury, and the jury found in favor of Respondent as to this claim.

Respondent subsequently appealed, among other issues, the district court's granting of judgment as a matter of law on Respondent's Section 1983 claim, and Petitioner likewise cross-appealed, among other issues, the judgment in favor of Respondent on the battery claim. Contrary to the district court's explicit factual findings as to the Section 1983 claim, the Court of Appeals reversed the district court's granting of judgment as a matter of law in favor of Petitioner and remanded the case to the district court for further proceedings. In so doing, the Court of Appeals reweighed the evidence with respect to whether Respondent was resisting at the time Petitioner applied the knee spikes, and concluded without support in the record that contrary to the district court's explicit findings, Respondent "was not resisting when Otte knee spiked him in the ribs." The Court of Appeals further concluded that "[h]aving determined that Otte's actions violated Roger's rights, we also determine, based upon the same facts, that qualified immunity does not protect Otte from civil liability."

Petitioner now seeks review in this Court.

REASONS FOR GRANTING THE WRIT

I.

CERTIORARI SHOULD BE GRANTED TO CLARIFY WHETHER A LAW ENFORCEMENT OFFICER, SUED IN HIS INDIVIDUAL CAPACITY PURSUANT TO SECTION 1983 FOR AN ALLEGED USE OF EXCESSIVE FORCE, POSSESSED QUALIFIED IMMUNITY IN LIGHT OF THIS COURT'S RECENT DECISION IN *SAUCIER v. KATZ*, 533 U.S. 194, 121 S. Ct. 2151, 150 L. Ed. 2d 272 (2001).

Certiorari should be granted in this case because the Court of Appeals erred in reversing the district court's order granting of Petitioner's Motion for Judgment as a Matter of Law based upon qualified immunity. As the district court found, the evidence presented at trial clearly demonstrated that Petitioner's conduct did not violate clearly established law, that Petitioner acted within the course and scope of his discretionary authority, and that the force used by Petitioner was reasonable and necessary under the facts presented. The decision of the Court of Appeals clearly conflicts with this Court's decision in *Saucier v. Katz*, 533 U.S. 194, 121 S. Ct. 2151, 150 L. Ed. 2d 272 (2001), other decisions of this Court, and decisions of other Courts of Appeal, and accordingly, this case is a proper case for exercise of this Court's supervisory power in resolving the errors committed below.

The doctrine of qualified immunity shields government officials performing discretionary functions from civil liability in their individual capacities. *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S. Ct. 2727, 2738, 73 L. Ed. 2d 396, 410 (1982). Under this doctrine, a governmental official performing a discretionary function will enjoy qualified immunity where the

official's conduct does not violate "clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow*, 457 U.S. at 818. The doctrine of qualified immunity serves to provide governmental officials with the ability to reasonably anticipate when their conduct may result in civil liability and to further protect governmental officials from the burdens of litigation when the question of whether the conduct about which the plaintiff complains violated clearly established law remains essentially unresolved. *Anderson v. Creighton*, 483 U.S. 635, 646, 107 S. Ct. 2806, 86 L. Ed. 2d 411, 431 (1985). In *Post v. City of Fort Lauderdale*, 7 F.3d 1552 (11th Cir. 1993, *modified* 14 F.3d 583 (11th Cir. 1994), the Eleventh Circuit recognized as follows:

> Suits against governmental officials for damages against them individually are costly not only for the defendants, but for society as a whole. The social costs include "the expenses of litigation, the diversion of official energy from pressing public issues, and the deterrence of able citizens from acceptance of public office."
>
> . . .
>
> Qualified immunity recognizes that, "where an official's duties legitimately require action in which clearly established rights are not implicated, the public interest may be better served by action taken 'with independence and without fear of consequences.'"

(citations omitted).

In *Lassiter v. Alabama A & M University*, 28 F.3d 1146, 1149 (11th Cir. 1994), the court further recognized that "only in exceptional circumstances will government actors have no shield

against claims made against them in their individual capacities." To this end, plaintiffs seeking redress for violations of their constitutional rights have more than one remedy. In a footnote in *Lassiter*, the court stated as follows:

> While qualified immunity *almost always applies in damage claims against government actors in their individual capacities*, the defense is a narrow one, leaving plaintiffs other avenues of relief. Plaintiffs remain free (subject to Eleventh Amendment constraints) to seek money damages against government actors in their official capacity. Plaintiffs may also seek injunctive relief.

Id. at 1149, n.2 (emphasis added). Hence, the court recognized that "courts should think long and hard before stripping defendants of immunity." *Id.* at 1149.

In *Saucier*, this Court has recently held that the determination as to whether a public official is entitled to qualified immunity involves a two-step process. First, the court must determine whether a constitutional right has been violated based upon the facts alleged. *Saucier*, 121 S. Ct. at 2155. In this regard, the court views the evidence in a light most favorable to the plaintiff. *Id.* at 2156. Second, if a violation has been established, the court must determine whether that right was "clearly established." *Id.* This inquiry is to be made in light of the "specific context of the case" and not as a "broad general proposition." *Id.* This Court has required "that the right the official is alleged to have violated must have been 'clearly established' in a more particularized, and hence more relevant sense: The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Id.* (quoting *Anderson*, 483 U.S. at 640). The dispositive inquiry in determining whether the right is

clearly established is "whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Id.* (citing *Wilson v. Layne*, 526 U.S. 603, 615, 119 S. Ct. 1692, 143 L. Ed. 2d 818 (1999)).

Throughout this case, Respondents have contended that Deputy Otte violated Mr. Livingston's constitutional rights by using excessive force while Mr. Livingston was a pre-trial detainee, including the use of kicking, beating, and hitting, as well as the inappropriate and unwarranted use of chemical weapons. In this regard, this Court, in *Graham v. Connor*, 490 U.S. 386, 395, 109 S. Ct. 1865, 1871, 104 L. Ed. 2d 443 (1989), stated that "*all claims* that law enforcement officers have used excessive force - deadly or not - in the course of an arrest, investigatory stop, or other 'seizure' of a free citizen should be analyzed under the Fourth Amendment and its *'reasonableness' standard* . . . " (emphasis added). The Court framed the critical inquiry by stating that "the question is whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation." *Graham*, 490 U.S. at 397. Application of the reasonableness standard requires the following:

> *careful attention to the facts and circumstances of each particular case*, including the severity of each particular crime at issue, *whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest* or attempting to evade arrest by flight.
>
> The reasonableness of a particular use of force must be judged *from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight*. . . . With respect to a claim of excessive

> force, the same standard of reasonableness *at the moment* applies: "Not every push or shove, even if it may later seem unnecessary in the peace of a judge's chambers," violates the Fourth Amendment. *The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments - in circumstances that are tense, uncertain, and rapidly evolving - about the amount of force that is necessary in a particular situation.*

Id. at 396-97 (citations omitted) (emphasis added).

In *Popham v. City of Kennesaw*, 820 F.2d 1570, 1576 (11th Cir. 1987), the court recognized that the question of whether the force used is excessive depends upon the facts of each particular case. In *Gilmere v. City of Atlanta*, 774 F.2d 1495, 1500-01 (11th Cir. 1985), the court further explained as follows:

> In determining whether the constitutional line has been crossed, a court must look to such factors as the need for the application of force, the relationship between the need and the amount of force that was used, the extent of the injury inflicted, and whether the force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm.

Accordingly, in *Popham*, the court recognized that the force which may be considered excessive in one setting, may be considered "necessary and reasonable" under different circumstances. *Popham*, 820 F.2d at 1576. "Because the standard establishes no bright line, qualified immunity applies *unless applications of the standard would inevitably lead every*

reasonable officer in [defendant's] position to conclude the force was unlawful." *Post,* 7 F.3d at 1559 (emphasis added).

In *Saucier*, this Court held that the "inquiries for qualified immunity and excessive force remain distinct" inquiries, and that the qualified immunity inquiry has a further dimension in that "[t]he concern of the immunity inquiry is to acknowledge that reasonable mistakes can be made as to the legal constraints on particular police conduct." *Saucier*, 121 S. Ct. at 2158. In this regard, this Court stated as follows:

> It is sometimes difficult for an officer to determine how the relevant legal doctrine, here excessive force, will apply to the factual situation the officer confronts. An officer might correctly perceive all of the relevant facts but have a mistaken understanding as to whether a particular amount of force is legal in those circumstances. If the officer's mistake as to what the law requires is reasonable, however, the officer is entitled to the immunity defense.

Id. Moreover, "If an officer reasonably, but mistakenly, believed that a suspect was likely to fight back, for instance, the officer would be justified in using more force than in fact was needed." *Id.*

In its opinion, the court below wholly failed to consider the second step of the analysis established by this Court in *Saucier*. Instead, the court below, after affirmatively concluding that Deputy Otte's conduct violated Respondent's constitutional rights, skipped the second step of the analysis in determining whether the right was clearly established, only to apply the very narrow exception to the rule requiring "particularized case law" in determining clearly established law. *See, e.g., Smith v. Mattox*, 127 F.3d 1416, 1419 (11th Cir. 1997). Under this narrowly

tailored exception, a plaintiff can overcome the defense of qualified immunity only by a "showing that the official's conduct lies so obviously at the very core of what the [Constitution] . . . prohibits that the unlawfulness of the conduct was *readily apparent* to the official." *Id.* (emphasis added).

In failing to consider the second step of the analysis, the court below circumvented its responsibility under *Saucier* to ensure that the qualified immunity analysis and the excessive force analysis remained distinct and separate inquiries. Instead of determining whether Deputy Otte's acts were objectively reasonable under the circumstances facing him at the time, the court below essentially concluded that because the evidence viewed in a light most favorable to Respondent showed that a constitutional violation occurred, no reasonable officer in Deputy Otte's position could have concluded that the force used was lawful.

While it can be argued that by skipping the second step of the *Saucier* analysis altogether, the court below effectively decided this issue in Petitioner's favor, in fact the court's failure to perform any analysis in this regard deprived Petitioner of the protection which the doctrine of qualified immunity affords and shifted the focus of the inquiry to the merits of Respondent's Section 1983 claim, instead. In this regard, the court below concluded that contrary to the district court's findings, "there was no need for the application of the force employed," as Respondent was "offering no resistance" at the time. The court based this conclusion in part on Respondent's own suggestion that he was not fighting back, and upon Deputy Ivankovich's testimony that he did not think Respondent was resisting "that much." Contrary to these conclusions, however, the evidence presented at trial, including the testimony from Respondent's own expert, showed that Mr. Livingston was resisting at the time. In considering the evidence, the district

court made an appropriate determination that Deputy Otte did not violate clearly established law.

The fact that the court below improperly focused on the merits of Respondent's excessive force claim is further evidenced by the fact that the court below found compelling the jury's finding, following its consideration of the battery claim, "that Otte applied the knee strikes in bad faith for malicious or sadistic reasons." In a footnote contained in the opinion, the court below maintained that "such a finding, standing alone, is sufficient to deny qualified immunity." Among other cases, however, the court below cited *Katz v. United States*, 194 F.3d 962 (9th Cir. 1999), which this Court ultimately reversed in *Saucier*. The court below concluded that based upon these alleged facts, "application of the excessive force standard would lead every reasonable officer to conclude that Otte's conduct was unlawful," and thus, the district court erred in granting qualified immunity to Deputy Otte.

The case at bar was simply not a proper case for application of the exception to the particularized case law rule. In *Priester v. City of Riviera Beach*, 208 F.3d 919, 927 (11th Cir. 2000), the court recognized that "the clearly-excessive-even-in-absence-of-case-law standard is a difficult standard to meet." This exception contemplates acts more crystallized than the acts in the case at bar. *See, e.g.*, *Priester*, 208 F.3d at 927 (citing *United States v. Lanier*, 520 U.S. 259, 117 S. Ct. 1219, 1227-28, 137 L. Ed. 2d 432 (1997) ("[t]he easiest cases don't even arise. There has never been . . . a section 1983 case accusing welfare officials of selling foster children into slavery; it does not follow that if such a case arose, the officials would be immune form damages [or criminal] liability."); *McDonald v. Haskins*, 966 F.2d 292, 295 (7th Cir. 1992) ("It would create perverse incentives indeed if a qualified immunity defense could succeed against those types of claims that have not previously

arisen because the behavior alleged is so egregious that no like case is on the books."). *See also Sinclair v. City of Des Moines*, 268 F.3d 594 (8th Cir. 2001) (holding that qualified immunity was appropriate where plaintiff opened door to his apartment with loaded gun in his hands); *Jackson v. City of Bremerton*, 268 F.3d 646 (9th Cir. 2001) (holding that use of force was necessary to control a "rapidly evolving" and escalating situation); *Medina v. Cram*, 252 F.3d 1124 (10th Cir. 2001); *Cox v. County of Prince William*, 249 F.3d 295 (4th Cir. 2001).

Here, and contrary to the conclusions of the court below, the district court in the case at bar correctly found that Deputy Otte possessed qualified immunity in this case, and based upon the uncontroverted evidence presented at trial, the district court's order should have been affirmed by the court below. The evidence presented at trial clearly showed that Deputy Otte acted within the course and scope of his discretionary authority, and that the force used by Deputy Otte was objectively reasonable and necessary in light of the facts and circumstances confronting him, in order for Deputy Otte to maintain order and control of Mr. Livingston while incarcerated at the Polk County Jail.

At trial, Deputy Otte testified that he entered Mr. Livingston's cell in order to clean Mr. Livingston, as well as his cell, and when confronted with resistance on Mr. Livingston's part, Deputy Otte acted to maintain order and prevent Mr. Livingston's harm or escape. Simply no evidence existed showing a contrary purpose on Deputy Otte's part, and no evidence existed at trial upon which the jury could conclude that Deputy Otte applied the knee strikes in bad faith, with a malicious purpose, or in a manner exhibiting wanton and willful disregard of human rights, safety, or property. Deputy Otte specifically testified that he had been attempting to gain control over Respondent, who posed a threat of bodily harm or escape.

Mr. Livingston had resisted Deputy Otte's efforts to control him, and Deputy Otte believed that Respondent was overpowering him in his attempt to get up from the floor. Deputy Otte received no active assistance from Deputy Ivankovich in the process, and in fact, Deputy Ivankovich admitted that Mr. Livingston had been resisting, yelling, struggling, and trying to push up at the time. In the totality of the circumstances, Deputy Otte attempted to apply knee strikes directed to the common peroneal as a means to bring Mr. Livingston under control. Unfortunately, in the struggle, the knee strikes apparently missed their mark and struck Mr. Livingston in the ribs, instead.

Contrary to the lower court's opinion, even Respondent's expert witness, James D. White, conceded that there was no question that Mr. Livingston had been struggling at the time of their application and that Deputy Otte's use of force was necessary. Petitioner's expert witness, David Bogard, agreed that Deputy Otte's actions complied with the General Orders of the Sheriff's Office relating to the use of the chemical agent, as well as the application of the knee strikes in question. Contrary to Respondent's assertions, then, Deputy Otte's actions and use of force were objectively reasonable under the circumstances. *See, e.g., Lassiter v. Alabama A&M University*, 28 F.3d 1146, 1149 (11th Cir. 1994); *Crosby v. Paulk*, 187 F.3d 1339, 1345 (11th Cir. 1999); *Hardin v. Hayes*, 957 F.2d 845, 848 (11th Cir. 1992).

The fact that "some" evidence existed in Respondent's favor was not enough to preclude a grant of qualified immunity in Petitioner's favor. As the Eleventh Circuit recognized in *Popham*, "the nonmoving party is not entitled to prevail simply because there is *some* evidence in his favor. *Popham*, 820 F.2d at 1576. Instead, there must be a conflict in *substantial* evidence." *Id.* (emphasis added). *See also Bailey v. Board of County Commissioners of Alachua County, Florida*, 956 F.2d

1112, 1119 (11th Cir. 1992) ("A mere scintilla of evidence does not create a jury question; there must be a substantial conflict in evidence to create a jury question.").

Given Mr. Livingston's continued struggle despite the officers' attempts to control him, Deputy Otte did not violate any clearly established law in applying the knee strikes. Deputy Otte clearly had lawful authority to enter cells, and if confronted with resistance, to use appropriate force. The district court correctly granted Petitioner's Motion for Judgment as a Matter of Law on this issue, and therefore, the district court's decision should have been affirmed by the court below.

II.

CERTIORARI SHOULD BE GRANTED BECAUSE THE EVIDENCE PRESENTED AT TRIAL FAILED TO SUPPORT RESPONDENT'S STATE LAW BATTERY CLAIM, AND THEREFORE, THE DISTRICT COURT SHOULD HAVE GRANTED PETITIONER'S MOTION FOR JUDGMENT AS A MATTER OF LAW AS TO THIS ISSUE.

The judgment entered by the district court in favor of Respondent as to the state law battery claim should have been reversed because no reasonable juror, exercising impartial judgment, could have determined based upon the evidence presented that Petitioner committed a battery under Florida law. Specifically, no record evidence existed that Deputy Otte unreasonably used force which was excessive under the circumstances. Moreover, even assuming some such evidence, no record evidence existed that Petitioner acted beyond the scope of his duties or in bad faith, with malicious purpose, or in a manner exhibiting wanton and wilful disregard of human rights, safety, or property. For these reasons, the jury's verdict was

contrary to the manifest weight of the evidence, and therefore, the court should have reversed the Final Judgment and remanded the case to the district court for entry of judgment in Petitioner's favor, or with instructions to grant Petitioner a new trial.

Under Florida law, in order to find a defendant liable for battery, the jury must find, in addition to proving every element of the tort of battery, that the defendant acted beyond the scope of the defendant's duties. Section 768.28(9), Florida Statutes (1995), provides that the waiver of sovereign immunity does not apply to "acts beyond the scope of [an employee's] duties, committed in bad faith or with malicious purpose, or that exhibited wanton and willful disregard of human rights, safety or property." This exception to the waiver must be read *in pari materia* with the general waiver statute, Fla. Stat. § 768.28(1), which states that a governmental agency will be liable for the wrongful acts of employees committed within the scope of their employment. *McGhee v. Volusia County*, 679 So.2d 729, 730 (1996); *Richardson v. City of Pompano Beach*, 511 So.2d 1121, 1123 (Fla. 4th DCA 1987).

In *McGhee*, the court recognized that a governmental employee will possess sovereign immunity, with the employing agency alone remaining liable, unless the employee's act fell *outside* the scope of employment. *Id.* at 733. The court stated that "[t]he employing agency is immune as a matter of law only if the acts are so extreme as to constitute a clearly unlawful usurpation of authority the deputy does not rightfully possess, or if there is not even a pretense of lawful right in the performance of the acts." *Id.* (citations omitted). *See also Hennagan v. Department of Highway Safety & Motor Vehicles*, 467 So.2d 748 (Fla. 1st DCA 1985) (holding that a deputy will possess sovereign immunity if the deputy acted within the scope of employment, even if the deputy acted maliciously, in bad

faith, or in a manner exhibiting wanton and willful disregard of the rights and safety of others).

In the case at bar, it is uncontroverted that Deputy Otte acted within the scope and course of his employment and that Deputy Otte acted to serve his employer. Conduct is within the scope of employment if it occurs substantially within authorized time and space limits, and it is activated at least in part by a purpose to serve the master. The purpose of the employee's act, rather than the method of performance thereof, constitutes the primary consideration under this analysis. *Hennagan*, 476 So.2d at 751. The distinction to be made is whether the officer abused power already vested with him or unlawfully usurped power the officer did not possess. *McGhee*, 679 So.2d at 723. In analyzing Respondent's battery claim, the focus should have been upon whether the amount of force used by Deputy Otte was reasonable under the circumstances. *See, e.g., City of Miami v. Sanders*, 672 So.2d 46, 47 (Fla. 3d DCA 1996) (citations omitted).

In the case at bar, the overwhelming evidence presented at trial demonstrated that Deputy Otte's use of force was reasonable under the facts and circumstances facing Deputy Otte at the time. Contrary to the findings of the court below, simply no evidence existed that Deputy Otte abused power vested in him as a deputy, or that Deputy Otte usurped power he did not possess. Moreover, contrary to the jury findings, no evidence existed supporting a finding of bad faith, maliciousness, wantonness, or wilfulness on Deputy Otte's part. To the contrary, Deputy Otte acted while on duty at the jail. He had the lawful authority to enter cells, and if confronted with resistance, to use appropriate force. Deputy Otte testified that he entered Mr. Livingston's cell in order to clean him and his cell, and when confronted with resistence on Mr. Livingston's part, Deputy Otte acted to maintain order and prevent his harm or

escape. Simply no evidence existed showing a contrary purpose on Deputy Otte's part, and in fact, Petitioner's and Respondent's experts both agreed that Deputy Otte's stated motives were appropriate in entering the cell.

The evidence in the instant case, at best, supports an inference that Deputy Otte may have acted negligently in entering Mr. Livingston's cell, but does not under any circumstances support an inference of bad faith, malicious purpose, or willful and wanton disregard. Deputy Otte's potential negligence in entering the cell, however, simply cannot, in and of itself, serve as a basis for battery. Moreover, Petitioner's and Respondent's experts both found Deputy Otte's use of the chemical spray and the take-down maneuver to be appropriate under the circumstances. Thus, although Respondents emphasized to the jury Deputy Otte's act in entering Mr. Livingston's cell in the first instance, the critical inquiry concerned Deputy Otte's use of the knee strikes, only, and in order for liability to attach, Deputy Otte must have acted in bad faith and with a malicious purpose in applying these strikes.

Allegations that Deputy Otte acted negligently in entering Mr. Livingston's cell door were simply irrelevant to the determination of whether Deputy Otte used excessive force. *See Fraire v. City of Arlington*, 957 F.2d 1268 (5th Cir. 1992). In *Fraire*, the plaintiffs alleged that the officer failed to follow correct procedure in displaying his badge and identifying himself, thereby creating the circumstances which gave rise to the fatal shooting. The court held, however, that regardless of what transpired *prior* to the shooting, the suspect's subsequent movements gave the officer reason to believe of the existence of a threat of physical harm so as to justify the shooting. *Id.* at 1276. *See also Young v. City of Kileen*, 775 F.2d 1349 (5th Cir. 1985).

Likewise, in the instant case, the circumstances surrounding the use of force must be analyzed from the point the cell door opened, at the moment Deputy Otte was confronted with Respondent's aggression. Any evidence or testimony concerning what transpired up to that point, regardless of whether Deputy Otte may have acted negligently by manufacturing the circumstances giving rise to the need for force, is irrelevant to the question of whether or not Deputy Otte's use of force was excessive.

Once Deputy Otte entered Mr. Livingston's cell, simply no substantial and competent evidence existed at trial from which an impartial jury could conclude that Deputy Otte applied the knee strikes in bad faith, with a malicious purpose, or in a manner exhibiting wanton and willful disregard of human rights, safety, or property. Deputy Otte testified that he had been attempting to gain control over Mr. Livingston, who at that moment posed a threat of bodily harm or escape. Mr. Livingston had resisted Deputy Otte's efforts to control him, and Deputy Otte believed that Mr. Livingston was overpowering him in his attempt to get up from the floor. As stated previously, Deputy Otte received no active assistance from Deputy Ivankovich in the process, and in fact, Deputy Ivankovich admitted that Respondent had been resisting, struggling, and trying to push up at the time. In the totality of the circumstances, Deputy Otte attempted to apply knee strikes directed to the common peroneal as a means to bring Mr. Livingston under control. Deputy Otte had received training on the use of such strikes and did not utilize them to inflict any great injury upon Mr. Livingston. Unfortunately, in the struggle, the knee strikes missed their mark and struck Mr. Livingston in the ribs, instead.

The fact that the evidence did not support a conclusion that Deputy Otte acted maliciously or in bad faith comported with the district court's finding that Deputy Otte possessed qualified

immunity in this case. Specifically, the district court found that Mr. Livingston continued to struggle against Deputy Otte's efforts, and given that continued resistance, Deputy Otte did not violate any clearly established law in applying the knee strikes. The district court further agreed that the force used by Deputy Otte was reasonable under the circumstances and specifically rejected Respondent's argument that the use of force was excessive. In this regard, the district court, in its order granting Petitioner's Motion for Judgment as a Matter of Law, stated in pertinent part as follows:

> Defendants assert that Plaintiffs have failed to establish that the actions of Otte violated any clearly established, then-existing law. Plaintiffs claim that a factual issue exists regarding the actual circumstances surrounding Otte's actions and thus, judgment as a matter of law in favor of Otte on the issue of qualified immunity is inappropriate. Plaintiffs further assert that a sheriff's deputy and at least one expert testified that Otte used excessive force against Livingston.
>
> *Plaintiffs' argument falls short.* First, although the Court recognizes that it must view the facts in the light most favorable to Plaintiffs, *the facts clearly establish that after Otte executed the take down maneuver on Livingston and at the time Otte administered the knee strikes to Livingston, Livingston continued to move, resist, or struggle against Otte. Even Plaintiffs' expert, professor James White, testified that he believed Livingston continued to resist Otte after the take down.* The only evidence that indicates otherwise is the testimony of former sheriff's deputy Mark Ivankovich ("Ivankovich"). Ivankovich testified that Livingston "was just on his

> hands and knees and yelling." *However, throughout the remainder of his testimony Ivankovich testified that he didn't think that Livingston "was resisting that much," that Livingston "was trying to push up a little," and that Livingston "was struggling." Additionally, the report made by Ivankovich shortly after the incident stated that Livingston was still resisting when he was on the ground and Ivankovich stated the same thing during his deposition.* Thus, taken as a whole, Ivankovich's testimony does not indicate that Livingston was completely non-resistant at the time Otte administered the knee strikes. *Consequently, contrary to Plaintiff's assertions, no question of fact exists as to whether or not Livingston continued to struggle after the take down by Otte.*
>
> *Given the fact that Livingston continued to struggle against Otte after the take down*, Plaintiffs have not presented to the Court nor can the Court find any clearly established, then-existing law that Otte violated by administering the knee strikes to Livingston. If Otte did not violate clearly established case law he is entitled to qualified immunity.

Given the district court's reasoning, then, the district court should have directed a verdict in favor of Deputy Otte as to Respondent's battery claim, as well. Simply stated, if Deputy Otte's actions were objectively reasonable for purposes of qualified immunity, as the district court correctly found, his actions cannot be characterized as being outside the scope of his employment, or as being willful, wanton, or malicious for purposes of a battery claim. The rationale underlying the qualified immunity analysis applies here as well, for in promulgating Fla. Stat. § 768.28(9), the Florida Legislature

specifically intended to protect governmental employees in the performance of their duties from the possibility that personal liability might attach as a result of their actions. As the Florida Supreme Court recognized in *McGhee*:

> [T]he 1979 Legislature passed SB 474, which amended subsection (9) of Section 768.29 [sic], Florida Statutes, in an attempt to clearly prevent personal liability of public employees. Although the Supreme Court did not address the 1979 legislation, there is some concern in light of their recent opinion, that the 1979 legislation does not in fact achieve the results intended, to wit: no personal liability for employees acting within the scope of their employment.
>
> . . . .
>
> The need for such a clear statement preventing personal liability of public employees for damages or injuries suffered as a result of an act, event or omission of action occasioned within the scope of their employment is evidenced by the Florida Supreme Court's statement that the "absence of an explicit prohibition against suing public employees for their torts suggests that none was intended.

McGhee, 679 So.2d at 732. Accordingly, in *McGhee*, the court specifically held that the veil of sovereign immunity should extend to governmental employees when they are acting within the course and scope of their employment. *Id.* at 732.

Based upon the evidence presented at trial, no reasonable juror, exercising impartial judgment, could determine based upon the evidence that Deputy Otte had committed a battery under Florida law. For these reasons, this Court should reverse

the Final Judgment entered in favor of Respondents and remand this case to the district court with instructions to enter judgment in favor of Petitioner, or grant Petitioner's Motion for a New Trial.

CONCLUSION

Certiorari should be granted so that the facts and circumstances of this case can be considered in light of this Court's decision in *Saucier*. Contrary to the decision of the court below, the case at bar was simply not a proper case for application of the exception to the particularized case law rule, and under the principles set forth in *Saucier*, Petitioner would be entitled to qualified immunity as a matter of law. The decision of the district court should have been affirmed by the court below.

Certiorari also should be granted because the evidence presented at trial failed to support Respondent's state law battery claim as a matter of fact and as a matter of law. If Petitioner's actions were objectively reasonable for purposes of qualified immunity, as the district court correctly found, his actions cannot be characterized as being outside the scope of his employment, or as being willful, wanton, or malicious for purposes of a state law battery claim. For this reason, the district court should have granted Petitioner's Motion for Judgment as a Matter of Law as to this issue, and the court below should have reversed.

Respectfully submitted,

CHRISTINE CASINGAL DALY
BRADLEY JOHNSON LAW FIRM, P.A.
225 East Park Avenue
Post Office Box 1260
Lake Wales, FL 33859-1260
(863) 676-1423

MONTERREY CAMPBELL
HANK B. CAMPBELL*
GRAY HARRIS ROBINSON
LANE TROHN
One Lake Morton Drive
Post Office Box 3
Lakeland, FL 33802-0003
(863) 284-2200

Attorneys for Petitioner

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DATED AND FILED JULY 30, 2001

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 99-15330
D.C. Docket No. 97-02163 CV-T-25B

JERRY LIVINGSTON, as Guardian of Roger Lee Livingston, ROGER LEE LIVINGSTON, individually,

Plaintiffs-Appellants,

versus

LAWRENCE W. CROW, JR., Sheriff of Polk County, in his official capacity, BRIAN WHIDDEN, et al.,

Defendants-Appellees.

No. 00-11699
D.C. Docket No. 97-02163 CV-T-25B

JERRY LIVINGSTON, as Guardian of Roger Lee Livingston,

Plaintiff-Appellee,

ROGER LEE LIVINGSTON, individually,

Plaintiff,

Appendix A

versus

LAWRENCE W. CROW, JR., Sheriff of Polk County, in his official capacity, BRIAN WHIDDEN, et al.,

Defendants,

EDWARD OTTE,

Defendant-Appellant.

Appeals from the United States District Court for the Middle District of Florida

(July 30, 2001)

Before BLACK, and BARKETT, Circuit Judges, and TIDWELL*, District Judge.

BARKETT, Circuit Judge:

Jerry Livingston, as attorney-in-fact and Next Friend of Roger Lee Livingston, and Roger Lee Livingston, individually, (collectively "the Livingstons") appeal from judgment as a matter of law entered after a jury trial in favor of Lawrence W. Crow, Jr., Sheriff of Polk County, on their Eighth Amendment failure to train claim, brought pursuit to 42 U.S.C. § 1983, and their state law battery and negligence claims. The Livingstons also appeal the district court's grant

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* Honorable G. Ernest Tidwell, U.S. District Judge for the Northern District of Georgia, sitting by designation.

of qualified immunity to Edward Otte on their § 1983 Fourteenth Amendment excessive force claim. Otte cross-appeals the district court's denial of his motion for judgment as a matter of law on the Livingstons' state-law battery claim and the district court's denial of his motion to amend the judgment to set off the amount the Livingstons received from a pre-trial settlement with a codefendant. We affirm in part and reverse and remand in part.

BACKGROUND

The facts viewed in the light most favorable to the Livingstons are as follows. In January 1996, Roger Livingston, a mentally handicapped adult, was admitted to The Meadows Convalescent Center. Approximately two months later, Roger wandered away from the Meadows and into a department store. While in the store, Roger followed and attempted to grab a customer. The store manager summoned the police who arrested Roger and transported him to the Polk County Jail.

Upon arrival at the jail, Roger refused to exit the back seat of the patrol car. In order to remove Roger from the car, Corrections Officer Bennie Hawley sprayed him with a chemical agent. Roger exited the car, was booked, and placed in a cell. Roger continually beat on the door of the cell and, in an attempt to quiet him down, Corrections Officer Brian Whidden sprayed Roger with a chemical agent.

The next morning, Corrections Officers Mark Ivankovich and Edward Otte were on duty. Otte, Ivankovich's superior, told Ivankovich that he wanted to transfer Roger from an

observation cell to a holding cage. Otte then ordered Ivankovich to open Roger's cell door and told Roger to stand away from the door. In response, Roger yelled "No, no, never. Country western, play country western." Otte then sprayed Roger with a chemical agent. At that point, Otte and Ivankovich grabbed Roger to take him down to the floor. During this maneuver, Roger's arm shook free from Ivankovich's grasp for a moment, however, Otte and Ivankovich were able to quickly put Roger on his hands and knees. Roger was not hostile or attacking the officers and was on his hands and knees when, according to Ivankovich's trial testimony, "the next thing I know, Otte just knee spiked him twice in the abdomen area . . . . [Roger] was just on his hands and knees. I mean, I don't think he was resisting that much." In his deposition, which was introduced at trial, Ivankovich stated that when Otte administered the knee strikes Roger was "looking up and just yelling. He wasn't really [struggling] — he was just on his hands and knees and yelling still." Moreover Roger testified via videotape deposition, which was admitted at trial, that after his arrival and booking at the jail he did not fight back with any of the officers. As a result of this incident, Roger was hospitalized and diagnosed with two fractured ribs, a fractured hand, post-traumatic stress disorder and post-concussion syndrome.

The Livingstons then filed this suit naming Sheriff Crow, in his official capacity, Otte, and the Meadows as defendants.[1]

---

1. At the close of discovery, Otte moved for summary judgment based upon qualified immunity. The district court denied Otte's motion noting that there was a factual dispute as to whether Roger was resisting when Otte administered the knee strikes. Otte appealed this ruling and we dismissed for lack of appellate jurisdiction.

Appendix A

Prior to trial, the Livingstons reached a settlement with the Meadows. During the jury trial both Crow and Otte moved for judgment as a matter of law pursuant to Fed. R. Civ. P. 50. The district court granted the Rule 50 motion as to the failure to train claim and the state battery and negligence claims against Crow and the excessive force claim against Otte on qualified immunity, allowing only the state battery claim against Otte to proceed to the jury. The jury returned a verdict against Otte, specifically finding that Otte acted in bad faith and the district court entered judgment in favor of the Livingstons. Otte then filed a motion to amend the judgment to reflect a setoff in the amount of the settlement the Livingstons received from the Meadows which was denied. This appeal followed.

We review the entry of judgment as a matter of law *de novo*, applying the same legal standard as the district court. *See S.E.C. v. Adler*, 137 F.3d 1325, 1340 (11th Cir. 1998). "[A] court should render judgment as a matter of law when 'a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue.' " *Reeves v. Sanderson Plumbing Prod., Inc.*, __ U.S. __, 120 S. Ct. 2109 (2000) (quoting Fed. R. Civ. P. 50). The district court's denial of Otte's post-trial motion is reviewed for abuse of discretion. *Bivens Gardens Office Bldg., Inc. v. Barnett Banks of Florida, Inc.*, 140 F.3d 898, 906 (11th Cir. 1998).

Appendix A

DISCUSSION

1. *Claims against Crow*

The Livingstons brought three claims against Crow in his official capacity: (1) a § 1983 claim alleging an Eighth Amendment violation based upon Crow's failure to train his subordinates; (2) a state law battery claim by which the Livingstons attempt to hold Crow, in his official capacity, liable for the actions of Otte; and (3) a state law negligence claim by which the Livingstons attempt to hold Crow, in his official capacity, liable for the actions of Whidden and Hawley when they sprayed Roger with the chemical agent. The district court entered judgment in favor of Crow on each of these claims and the Livingstons appeal these rulings. We consider each in turn.

a. § 1983 Failure to Train

In *Monell v. Department of Social Services*, 436 U.S. 658, 691 (1978), the Supreme Court held that although there is no *respondeat superior* liability under § 1983, a plaintiff may prevail on a § 1983 claim against a municipality if the violation of his rights was caused by the "execution of a government's custom or policy, whether made by its lawmakers or by those whose edicts and acts may fairly be said to represent official policy . . . ." *Id.* at 691-92. An allegation of a failure to train can be the basis for municipal liability under § 1983 only where (1) the municipality inadequately trains its employees, (2) this failure to train is a city policy, and (3) that city policy causes the employees to violate a citizen's constitutional rights. *See City of Canton,*

Ohio v. Harris, 489 U.S. 378, 387-91 (1989). The district court granted judgment to Crow on this claim finding that the Livingstons had failed to produce evidence of causation. Upon review of the record and consideration of the arguments of the parties, we cannot say that the district court erred in reaching this conclusion.

b. State Law Battery and Negligence Claims against Crow

Unlike § 1983, which does not recognize the principle of *respondeat superior* liability, Florida Statutes § 768.28 provides that the state of Florida — or a public official in his official capacity — may be held liable for the acts of its employees or agents "under circumstances in which the state or agency or subdivision, if a private person, would be liable to the claimant, in accordance with the general laws of this state." Fla. Stat. § 768.28(1). However, in order to fall within the purview of this statute, a plaintiff must "serve [process] upon the head of the agency concerned and also . . . upon the Department of Insurance. . . ." Fla. Stat. § 768.27(7). Failure to comply with this service requirement mandates judgment in favor of the state defendant. *See Miami-Dade County v. Meyers*, 734 So. 2d 507 (Fla. Dist. Ct. App. 1999). Here, the Livingstons did not serve process on the Department before they had rested their case and the district court entered judgment in favor of Crow due to this failure. On appeal, the Livingstons argue that this was error because Crow waived any objection to service of process by failing to raise it in his motion to dismiss. *See Lemonik v. Metro. Dade County*, 672 So. 2d 899 (Fla. Dist. Ct. App. 1996) (holding that the defense of failure to comply with § 768.27(7) may be waived).

Appendix A

Federal Rule of Civil Procedure 12(g) provides that "[i]f a party makes a motion under this rule but omits therefrom any defense or objection then available to the party which this rule permits to be raised by motion, the party shall not thereafter make a motion based upon the defense or objection omitted." Rule 12(h) further states that "[a] defense of . . . insufficiency or process, or insufficiency of service of process is waived if . . . omitted from a motion in the circumstances described in subsection (g) . . . ." Here, Crow filed a motion to dismiss arguing that the complaint failed to state a claim, however, Crow did not challenge the Livingstons' failure to serve the Department of Insurance. Thus, under Rule 12(g) and (h), Crow waived any defense based upon this insufficiency of the service and could not assert it as a basis for his Rule 50 motion.

In response, Crow first argues that Rule 12(g) — which states that a defendant waives any defense "available" at the tune of the filing of a motion to dismiss — does not apply here because the defense of failure to comply with § 768.28(7) was not "available" to him when he filed his motion to dismiss. He makes this unique argument suggesting that in order for a defense to be considered "available" under Rule 12(g), the defense must necessarily result in dismissal of the action. Here, because the plaintiff has until he has rested his case at trial to serve the Department,[1] Crow argues

1. Under Florida law, where the Department of Insurance is a third-party to the suit, as here, a Plaintiff has up and until he rests his case-in-chief to serve process upon the Department. *Lemonik*, 672 So. 2d at 900 ("Service of process upon the Department as a nonparty, although statutorily mandated, however, is not a precondition to the (Cont'd)

that the defense was not "available" until then. First, although a motion to dismiss based upon failure to comply with § 768.28(7) might simply have resulted in the service being effectuated upon the Department, it does not follow that the defense was not "available" to Crow. Indeed, many arguments raised in a Rule 12(b) motion do not compel the dismissal of the claim, but rather simply give the parties notice of any defect in their case and provide a fair opportunity to remedy them. For example, we have held that it is error to dismiss a case with prejudice for failure to state a claim without first granting the plaintiff an opportunity to amend their complaint, see *Bank v. Pitt*, 928 F.2d 1108, 1112 (11th Cir. 1991), however that does not mean that a defense for failure to state a claim is not available to defendants. Moreover, Crow's argument is severely undercut by the fact that he asserted non-compliance with § 768.28 in his answer and affirmative defenses. If the defense was available when filing an answer, it was available at the motion to dismiss. Crow also argues Rule 12(h)'s waiver provision does not apply because any defense based upon non-compliance with § 768.28(7) is not a defense based upon insufficiency of service of process. It is clear, however, from the text of the statute that a defense based upon § 768.28(7) is based upon insufficiency of service. Thus, because Crow waived any defense based upon non-compliance with § 768.28(7), the district court erred in granting judgment to Crow on both the battery and negligence claims for failure to serve the Department of Insurance.

(Cont'd)
maintenance of a tort action against a governmental agency. Indeed, the legislature did not prescribe any time frame whatsoever in section 768.28(7) for a plaintiff to effectuate service upon the Department when the Department is not otherwise a party to the action.") (internal citations omitted).

We nonetheless affirm the judgment for Crow on the battery claim because the jury found that Otte acted in bad faith. Florida Statutes § 768.28(9)(a) provides that Florida's general waiver of immunity does not apply to acts (1) beyond the scope of their duties, (2) committed in bad faith or with malicious purpose, or (3) that exhibit wanton and wilful disregard of human rights, safety, or property. Thus, judgment in favor of Crow is mandated on the state battery claim because sovereign immunity bars the claim.

For the foregoing reasons we reverse the judgment as a matter of law for Crow on the negligence claim, but affirm the judgment as a matter of law in Crow's favor on the battery claim and the § 1983 failure to train claims.

2. *Claims against Otte*

The Livingstons brought two claims against Otte: (1) a § 1983 Fourteenth Amendment excessive force claim; and (2) a state law battery claim. The district court granted qualified immunity to Otte on the § 1983 claim and denied Otte's motion for judgment as a matter of law on the battery claim. Additionally, the district court denied Otte's motion to alter or amend the judgment on the battery claim. The Livingstons appeal the district court's grant of qualified immunity and Otte appeals the denial of his motions. We consider each claim in turn.

a. § 1983 Excessive Force Claim

"A court evaluating a claim of qualified immunity must first determine whether the plaintiff has alleged the deprivation of an actual constitutional right at all, and if so,

proceed to determine whether that right was clearly established at the time of the alleged violation." *Wilson v. Layne*, 526 U.S. 603, 609 (1999) (internal quotations omitted). Thus, we address initially the question of whether Otte's actions violated Roger Livingston's constitutional rights.

Pretrial detainees may bring § 1983 actions to redress violations of their rights under the Due Process Clause of the Fourteenth Amendment, which "protects a pretrial detainee from the use of excessive force that amounts to punishment." *Graham v. Connor*, 490 U.S. 386, 395 n. 10 (1989). In order to determine if an application of force violates the Constitution, we consider "(1) the need for the application of force, (2) the relationship between the need and the amount of force used, (3) the extent of the injury inflicted and, (4) whether the force was applied in good faith or maliciously and sadistically." *Moore v. Gwinnett County*, 967 F.2d 1495, 1498 (11th Cir. 1992).

Here, the evidence, viewed in the light most favorable to the Livingstons, was that, aware that Roger was a mentally ill individual, Otte entered his cell, sprayed him with a chemical agent and, when Roger was on his hands and knees, administered two knee strikes to Roger's chest area, resulting in fractured ribs. Although Roger was screaming "Play country western" when Otte entered the cell, he was not resisting when Otte knee spiked him in the ribs.[2] Based upon

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2. The district court based its grant of judgment to Otte on this claim upon its determination that Roger was resisting when Otte administered the knee spikes. Although there was evidence at trial to

(Cont'd)

these facts, we conclude that Otte's use of force was excessive and violated Roger's Fourteenth Amendment rights. Having determined that Otte's actions violated Roger's rights, we also determine, based upon the same facts, that qualified immunity does not protect Otte from civil liability.

In an excessive force case, a plaintiff can overcome the defense of qualified immunity by "showing that the official's conduct lies so obviously at the very core of what the [Constitution] . . . prohibits that the unlawfulness of the conduct was readily apparent to the official." *Smith v. Mattox*, 127 F.3d 1416, 1419 (11th Cir. 1997). In addition to whether the detainee is resisting the officer, we also consider "(1) the need for the application of force, (2) the relationship between the need and the amount of force used, (3) the extent of the injury inflicted and, (4) whether the force was applied in good faith or maliciously and sadistically." *Moore*, 967 F.2d at 1498.

(Cont'd)

support this conclusion, there was also evidence that Roger was *not* resisting during the incident. For example, there was testimony that when Otte administered the knee strikes Roger was "looking up and just yelling. He wasn't really [struggling] — he was just on his hands and knees and yelling still." Further, Roger testified via videotape deposition, which was admitted at trial, that after his arrival and booking at the jail he did not fight back with any of the officers. Accordingly, there was a material issue of fact as to whether Roger was resisting. In ruling on a Rule 50 motion, the court must resolve all factual disputes in favor of the non-moving party. Thus, the district court erred in determining that Roger was resisting when Otte administered the knee strikes.

Here, the evidence, viewed in the light most favorable to the Livingstons, was that there was no need for the application of the force employed. Indeed, there was testimony from both plaintiff and defense experts that the proper course of action would have been for Otte never to have entered the cell. Moreover, the testimony was that Roger was on his hands and knees offering no resistance when Otte administered the knee strikes. The evidence also demonstrated that the amount of force used was disproportionate to the force required under the circumstances. Ivankovich testified at trial that when Otte administered the knee strikes to the ribs, Roger "was on the floor just yelling and screaming," and that "I don't think he was resisting that much." As noted above, Ivankovich's deposition testimony, in which he stated that Roger was just "looking up and yelling" when Otte administered the knee strikes, was also admitted, as was Roger's own deposition testimony in which he stated that he did not fight back against any of the officers after he had been booked at the jail. Moreover, Otte eviscerated any argument that the use of force was proportional when he administered the second unnecessary knee strike to Roger's ribs. The evidence also supported the conclusion that as a result of the knee strikes, Roger sustained a serious and painful injury — fractured ribs. Finally, the evidence was, as the jury found, that Otte applied the knee strikes in bad faith for malicious or sadistic reasons.[3] Based upon the

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3. Some circuits have held that such a finding, standing alone, is sufficient to deny qualified immunity. *See Frazell v. Flanigan*, 102 F.3d 877, 886-87 (7th Cir. 1996) ("once a jury has determined under the Fourth Amendment that the officer's conduct was objectively unreasonable, that conclusion necessarily resolves for

(Cont'd)

foregoing, we conclude that application of the excessive force standard would lead every reasonable officer to conclude that Otte's conduct was unlawful, and thus we conclude that the district court erred in granting qualified immunity to Otte.

b. State Law Battery Claim

Otte argues that because the alleged conduct occurred while he was on the job, at the place of his employment, and was an exercise of his lawful duties, his use of force against Roger Livingston was "within the scope of his employment" and, under Florida law, he cannot be held personally liable for it.

Florida Statutes § 768.28(1) provides that Florida waives sovereign immunity and is liable for the negligent or wrongful act or omission of any employee of the state while acting within the scope of office or employment. However, Florida Statutes § 768.28(9)(a) provides that this waiver does not apply to and that governmental employees are personally liable for, acts (1) beyond the scope of their duties, (2) committed in bad faith or with malicious purpose, or (3) that exhibit wanton and wilful disregard of human rights, safety, or property.

(Cont'd)
immunity purposes whether a reasonable officer could have believed that his conduct was lawful"); *see also Katz v. United States*, 194 F.3d 962 (9th Cir. 1999), cert. granted under the name *Saucier v. Katz*, __ U.S. __, 121 S.Ct. 480 (2000); *Scott v. District of Columbia*, 101 F.3d 748, 759 (D.C. Cir. 1996); *Street v. Parham*, 929 F.2d 537, 540, 541 n. 2 (10th Cir. 1991); *Holt v. Ards*, 843 F.2d 242, 246 (6th Cir. 1988).

In *McGhee v. Volusia County*, 679 So. 2d 729, 733 (Fla. 1996), the Florida Supreme Court noted that in an excessive force/battery case there is often an issue of fact as to whether the defendant or the State is liable for the actions, and held that "the fact that [the defendant] . . . may have intentionally abused his office does not in itself shield the [State] from liability." In order to resolve this issue of fact, "the question must be put to the fact-finder whether [the deputy] . . . acted in bad faith, with malicious purpose, or in a manner exhibiting wanton or wilful disregard of human rights, safety, or property." *Id.* Here, the district court did just that, and the jury found that Otte acted in bad faith. Although there is some evidence supporting Otte's contention that he did not act in bad faith, we cannot say that the jury's finding is without support. Therefore, the district court did not err in denying Otte's motion for judgment as a matter of law.

c. Motion to Alter or Amend Judgment

Otte finally argues that the district court abused its discretion in denying his post-trial motion to alter or amend the judgment because: (1) the manifest weight of the evidence did not support the damages awarded by the jury; (2) the jury was unduly influenced by evidence relating to the claims against Sheriff Crow; and (3) the final judgment did not reflect a set off for those amounts the Livingstons received in a pre-trial settlement for their claims against the Meadows. Of these arguments, only the third warrants discussion.

Florida Statutes § 768.041 allows a defendant to set off the amount of a judgment against him when a plaintiff has settled with a joint tortfeasor. A set off is inappropriate when

a plaintiff has separate claims against each defendant. *See Lauth v. Olsten Home Healthcare, Inc.*, 678 So. 2d 447, 448 (Fla. Dist. Ct. App. 1996). "A separate and distinct claim is one that involves different elements of damages." *Id.* at 448.

Here, the Livingstons brought claims against the Meadows for violations of Florida Statutes § 400.428 — the nursing home resident's bill of rights. Although the claim against the Meadows sought recovery for damages Roger sustained when he "wandered away" from the Meadows and was arrested at the department store, the complaint also sought damages for: (1) failure to provide adequate and appropriate health care; (2) failure to provide sufficient therapeutic and rehabilitative services; (3) failure to properly assess Roger's condition; (4) failure to properly develop a resident care plan; and (5) failure to notify the family of changes in Roger's condition. Accordingly, the Livingstons brought separate claims against Otte and the Meadows, and the district court did not abuse its discretion in denying Otte's motion.

CONCLUSION

For all of the foregoing reasons, the rulings of the district court are affirmed in part and reversed and remanded in part. We affirm the district court's grant of judgment as a matter of law to Crow on the § 1983 claim, its grant of judgment to Crow on the battery claim, its denial of Otte's motion for judgment as a matter of law on the battery claim, and its denial of Otte's motion to amend judgment. We reverse and remand the district court's grant of judgment as a matter of

law to Crow on the negligence claim, and the grant of qualified immunity to Otte on the § 1983 excessive force claim.

AFFIRMED IN PART, REVERSED AND REMANDED IN PART

BLACK, Circuit Judge, specially concurring:

I concur in the result.

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA, TAMPA DIVISION DATED NOVEMBER 18, 1999 AND FILED NOVEMBER 19, 1999

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

CASE NO. 97-2163-CIV-T-25B

JERRY LIVINGSTON, et al.

Plaintiffs,

v.

LAWRENCE CROW, et al.,

Defendants.

ORDER

This cause is before the Court on the Defendants' motion made pursuant to Fed. R. Civ. P. 50. Upon consideration, the Court finds as follows:

Defendants have moved, pursuant to Rule 50, for judgment as a matter of law on four grounds: (1) Plaintiffs have not proven their claim under 42 U.S.C. § 1983 ("§ 1983") against defendant Edward Otte ("Otte") because Otte is entitled to qualified immunity for his actions which allegedly violated Plaintiff Roger Livingston's ("Livingston") constitutional rights and Otte's actions did not constitute

excessive force; (2) Plaintiffs have not proven their § 1983 claim against defendant Sheriff Lawrence Crow ("Sheriff") because Plaintiffs have not established a causal link between the Sheriff's alleged failure to adequately train or establish policy regarding the handling of mentally disabled persons and Plaintiffs' injuries and Plaintiffs have failed to establish deliberate indifference by the Sheriff in failing to provide adequate psychiatric and medical care to Livingston; (3) Plaintiffs have failed to establish a state law battery claim against Otte because they have not proven that Otte's actions were willful, wanton, or malicious; and (4) Plaintiffs cannot sustain their state law claims against the Sheriff because they have failed to comply with the requirements of Fla. Stat. §768.28(7).

"[I]n considering a motion for a directed verdict, the court does not weigh the evidence, but draws all factual inferences in favor of the nonmoving party." *Lytle v. Household Manufacturing, Inc.*, 494 U.S. 545, 554 (1990) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255, 106 S.Ct. 2505, 2513, 91 L.Ed.2d 202 (1986)). The court should grant a motion for judgment as a matter of law only if it finds that reasonable people exercising impartial judgment could not arrive at a contrary verdict, and the court may not weigh the evidence or decide the credibility of the witnesses. *Berman v. Orkin Exterminating Co., Inc.*, 160 F.3d 697, 701 (11th Cir. 1998). "To survive a motion for judgment as a matter of law, the nonmoving party must provide more than a scintilla of evidence that there is a substantial conflict in evidence to support a jury question." *Id.* (internal quotations omitted and footnote omitted).

Appendix B

1. Qualified Immunity of Otte

Qualified immunity is an affirmative defense available to government officials being sued in their individual capacities. *Harlow v. Fitzgerald*, 457 U.S. 800, 815 (1982). "[G]overnment officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate the clearly established statutory or constitutional rights of which a reasonable person should have known." *Id.* at 813; *see also Anderson v. Creighton*, 483 U.S. 635, 640 (1987).

In resolving the issue of qualified immunity, the Court must first determine "whether the legal norms allegedly violated the defendant were clearly established at the time of the challenged actions." *Mitchell v Forsyth*, 472 U.S. 511, 528 (1985). The defendant must have been aware of more than just an abstract right; rather, the case law in factual terms must set out a "bright line" to establish that his conduct violated that right. *See Smith v. Mattox*, 127 F.3d 1416, 1419 (11th Cir. 1997) (quoting *Kelley v. Curtis*, 21 F.3d 1544, 1550 (11th Cir. 1994)). The qualified immunity defense also embodies an "objective reasonableness" standard — that is, the official's actions must have been "so obviously illegal in the light of then-existing law that only an official who was incompetent or who knowingly was violating the law would have committed them." *GJR Investments v. County of Escambia, Fla.*, 132 F.3d 1359, 1366 (11th Cir. 1998).

Defendants assert that Plaintiffs have failed to establish that the actions of Otte violated any clearly established, then-existing law. Plaintiff's claim that a factual issue exists

regarding the actual circumstances surrounding Otte's actions and thus, judgment as a matter of law in favor of Otte on the issue of qualified immunity is inappropriate. Plaintiffs further assert that a sheriff's deputy and at least one expert testified that Otte used excessive force against Livingston.

Plaintiffs' arguments fall short. First, although the Court recognizes that it must view the facts in the light most favorable to Plaintiffs, the facts clearly establish that after Otte executed the take down maneuver on Livingston and at the time Otte administered the knee strikes to Livingston, Livingston continued to move, resist, or struggle against Otte. Even Plaintiffs' expert, professor James White, testified that he believed Livingston continued to resist Otte after the take down. The only evidence that indicates otherwise is the testimony of former sheriffs deputy Mark Ivankovich ("Ivankovich"). Ivankovich testified that Livingston "was just on his hands and knees and yelling." However, throughout the remainder of his testimony Ivankovich testified that he didn't think that Livingston "was resisting that much," that Livingston "was trying to push up a little," and that Livingston "was struggling." Additionally, the report made by Ivankovich shortly after the incident stated that Livingston was still resisting when he was on the ground and Ivankovich stated the same thing during his deposition. Thus, taken as a whole, Ivankovich's testimony does not indicate that Livingston was completely non-resistant at the time Otte administered the knee strikes. Consequently, contrary to Plaintiffs' assertions, no question of fact exists as to whether or not Livingston continued to struggle after the take down by Otte.

Appendix B

Given the fact that Livingston continued to struggle against Otte after the take down, Plaintiffs have not presented to the Court nor can the Court find any clearly established, then-existing law that Otte violated by administering the knee strikes to Livingston. If Otte did not violate clearly established case law he is entitled to qualified immunity. Therefore, Defendants' motion for judgment as a matter of law on the § 1983 claim against Otte is granted.

2. §1983 Claim Against the Sheriff

Plaintiffs' § 1983 claim against the Sheriff has two bases: (1) a failure to adequately train Sheriff's employees regarding the handling of mentally disabled persons and (2) a failure to provide adequate medical and psychiatric care to Livingston. Defendants move for judgment as a matter of law because, according to Defendants, Plaintiffs have not established a causal link between the Sheriff's alleged failure to adequately train or establish policy regarding the handling of mentally disabled persons and Plaintiffs' injuries and because Plaintiffs have failed to establish deliberate indifference by the Sheriff in failing to provide adequate psychiatric and medical care to Livingston.

a. Failure to Adequately Train

Plaintiffs allege that the Sheriff failed to adequately train his employees in handling mentally disabled people and as a result Livingston suffered injuries while in the custody of the Sheriff. The evidence showed that Sheriff's deputies received training in the handling of mentally disabled people while at the academy. Plaintiffs did not challenge the

adequacy of this training. In fact, Plaintiffs' expert testified that the training received at the academy by Otte was a "standard well prepared training format." Plaintiffs, instead, challenge the fact that the Sheriff failed to provide continuing training to his employees on the handling of mentally disabled persons. Plaintiffs' expert testified that the Sheriff should have provided ongoing training. Plaintiffs' expert further testified that the standard cycle for such continuing training is four years..

The evidence showed that Otte had received his training at the academy approximately two years prior to the incident at issue. Therefore, even if the Sheriff had provided continuing training to his employees, as recommended by Plaintiffs' expert, Otte might not have been required to take the training. Further, none of Plaintiffs' witnesses explained what type of additional training would have prevented the incident at issue or how the training, or lack thereof, received by Otte caused the incident.

In order to establish liability under § 1983 for inadequacy of police training, the alleged failure to train must amount "to deliberate indifference to the rights of persons with whom the police come into contact." *Gold v City of Miami*, 151 F.3d 1346, 1350 (11th Cir. 1998). Furthermore, a "municipality can be liable under § 1983 only where its policies are the 'moving force [behind] the constitutional violation.' " *Id.* Plaintiffs have failed to meet their burden. Plaintiffs have failed to establish that the Sheriff's policy of relying on the training his employees received at the academy and not providing continuing training regarding the handling of mentally disabled persons constitutes deliberate indifference

to the rights of persons. Plaintiffs have also failed to establish that the Sheriff's failure to train Otte was the moving force behind Otte's actions. Without this causal link between the Sheriff's policies and the Plaintiffs' injuries, the Sheriff cannot be held liable under § 1983. Consequently, Defendants' motion for judgment as a matter of law on Plaintiffs' § 1983 claim against the Sheriff for failure to train must be granted.

b. Failure to Provide Adequate Medical and Psychiatric Care

In order to establish a § 1983 claim against the Sheriff for failure to provide adequate medical care, Plaintiffs must establish "acts or omissions sufficiently harmful to evidence deliberate indifference to serious medical needs." *Adams v. Poag*, 61 F.3d 1537, 1543 (11th Cir. 1995) (quoting *Estelle v. Gamble*, 429 U.S. 97, 106 (1976)). To constitute deliberate indifference the complained of actions must rise to a level beyond mere negligence, inadvertence, or error in good faith. *Id. See also Estelle v. Gamble*, 429 U.S. at 106; *Howell v. Evans*, 922 F.2d 712, 719 (11th Cir. 1991). Thus, Plaintiffs must demonstrate that the Sheriff exhibited a reckless disregard for Livingston's medical and psychiatric well being.

Plaintiffs have failed to present evidence that establishes that the Sheriff's office acted with deliberate indifference toward Livingston in administering medical and psychiatric treatment. The testimony establishes that Livingston was examined twice by a nurse after being taken into custody and before Otte entered Livingston's cell. The evidence also establishes that employees of the Sheriff observed Livingston in his cell on a regular basis. Plaintiffs have not produced

any evidence that the medical care Livingston received from the nurse varied from contemporary medical standards or that any care was deliberately withheld from Livingston. Having failed to establish either of these things, Plaintiffs have failed to establish that the Sheriff acted with deliberate indifference in providing, or failing to provide, Livingston with medical and psychiatric care. Consequently, Defendants' motion for judgment as a matter of law as to the §1983 claim against the Sheriff for failure to provide adequate medical and psychiatric care should be granted.

3. Battery Claim Against Otte

Defendants move for judgment as a matter of law on Plaintiffs' battery claim against Otte individually. Defendants argue that in order to find Otte individually liable §768.28(9)(a) requires Otte's actions to have been "acted in bad faith or with malicious purpose or in a manner exhibiting wanton and willful disregard of human rights, safety, or property." Fla. Stat. §768.28(9)(a). Defendants assert that Plaintiffs have not presented any facts that would establish that Otte's actions were done in bad faith, were malicious or willful and wanton. Plaintiffs argue that whether Otte's actions were done in bad faith, were malicious, or were willful and wanton is a question of fact for the jury to determine.

The Court agrees with Plaintiffs. Based on the evidence presented the Court finds that a reasonable person could find that Otte's actions were done in bad faith, were malicious, or were willful and wanton. Consequently, Defendants' motion for judgment as a matter of law on the battery claim against Otte individually is denied.

Appendix B

4. State Law Claims Against the Sheriff

Defendants move to dismiss Plaintiffs' state law claims against the Sheriff for failure to comply with §768.28(7), Fla. Stat. Section 768.28, Fla. Stat., waives the state's sovereign immunity and allows a person to sue the state under certain conditions. Subsection 7 of the statute states:

> In actions brought pursuant to this section, process shall be served upon the head of the agency concerned and also, except as to a defendant municipality or the Spaceport Florida Authority, upon the Department of Insurance; and the department or the agency concerned shall have 30 days within which to plead thereto.

Fla. Stat. §768.28(7). Defendants assert that Plaintiffs have failed to serve process upon the Department of Insurance as required by the statute. Plaintiffs have offered no evidence to demonstrate that they complied with this section of the statute prior to resting their case. The evidence offered by Plaintiffs establishes service of process on the Department of Insurance only after Plaintiffs rested at trial.

Florida case law indicates that although compliance with §768.28(7) can be waived, the defense of failure to comply with the service requirements is not waived if the defendant raises it in defendant's responsive motion or answer to the complaint. *Lemonik v. Metropolitan Dade County*, 672 So.2d 899, 900 (Fla. Ct. App. 1996). Plaintiffs oppose Defendants' motion and cite to several cases. However, the cases relied upon by Plaintiffs are not on point. The cases cited by Plaintiff

discuss the time frame in which the Department of Insurance must be served. The cases do not address the issue of failure to serve the Department of Insurance.

In this case Defendants raised the failure to comply with §768.28 in their answer and as an affirmative defense. Although Plaintiffs could have cured their failure to serve the Department of Insurance at any time prior to resting their case, they failed to do so. Consequently, the Court finds that Plaintiffs failed to comply with Fla. Stat. §768.28(7) and thus Defendants are entitled to judgment as a matter of law on all state law claims against the Sheriff.

Accordingly, it is

ORDERED:

Defendants' motion for judgment as a matter of law is **GRANTED in part and DENIED in part**:

a. Defendants' motion as to the §1983 claim against Otte is **GRANTED**;

b. Defendants' motion as to the §1983 claims against the Sheriff is **GRANTED**;

c. Defendants' motion as to the state law battery claim against Otte is **DENIED**;

d. Defendants' motion as to the state law claims against the Sheriff is **GRANTED**.

Appendix B

DONE AND ORDERED at Tampa, Florida this 18th day of November, 1999.

s/ Henry Lee Adams, Jr.
HENRY LEE ADAMS, JR.
UNITED STATES DISTRICT JUDGE

APPENDIX C — JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA, TAMPA DIVISION DATED AND FILED NOVEMBER 23, 1999

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

CASE NO. 97-2163-CIV-T-25B

JERRY LIVINGSTON, as Attorney in Fact and Next Friend of ROGER LEE LIVINGSTON, and ROGER LEE LIVINGSTON, individually,

Plaintiffs,

VS.

EDWARD OTTE,

Defendant.

JUDGMENT IN A CIVIL CASE

☒ **Jury Verdict.** This action came before the court for trial by jury. The issues have been tried and the jury has rendered its verdict.

* * *

IT IS ORDERED AND ADJUDGED that judgment is hereby entered on behalf of the Plaintiffs, JERRY LIVINGSTON, as Attorney in Fact and Next Friend of

Appendix C

ROGER LEE LIVINGSTON, and ROGER LEE LIVINGSTON, individually, and against the Defendant, EDWARD OTTE, in the amount of $896,132.00, for which sum let execution issue.

November 23, 1999 **SHERYL L. LOESCH, CLERK**

s/ Anne H. Ohle
(By) Deputy Clerk

APPENDIX D — VERDICT OF THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA, TAMPA DIVISION DATED NOVEMBER 12, 1999

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

CASE NO. 97-2163-CIV-T-25B

JERRY LIVINGSTON, as Attorney in Fact and Next Friend of ROGER LEE LIVINGSTON, and ROGER LEE LIVINGSTON, individually,

Plaintiffs,

v.

EDWARD OTTE,

Defendant.

VERDICT

We, the Jury, return the following verdict:

1. Did EDWARD OTTE commit a battery which was a legal cause of injury to ROGER LEE LIVINGSTON?

Yes ✓ No ____

If your answer to question 1 is yes, please answer question 2.

If your answer to question 1 is no, your verdict is for Defendant EDWARD OTTE and you should proceed no further other than to date and sign this form.

Appendix D

2. In committing a battery upon ROGER LEE LIVINGSTON, did EDWARD OTTE act in bad faith or with malicious purpose or in a manner exhibiting wanton and wilful disregard for human rights or safety.

Yes ✓ No ____

If your answer to question 2 is yes, please answer questions 3 and 4.

If your answer to question 2 is no, your verdict is for Defendant EDWARD OTTE and you should proceed no further other than to date and sign this form.

3. What is the amount of any damages sustained by ROGER LEE LIVINGSTON for medical expenses, Health care and/or nursing care?

In the past: $146,132

In the future: $650,000

4. What is the amount of any damages sustained by ROGER LEE LIVINGSTON for pain and suffering, disability, physical impairment, mental anguish, inconvenience, aggravation of a disease or physical defect or loss of capacity for the enjoyment of life?

In the past: $50,000

In the future: $50,000

SO SAY WE ALL this 12th day of November, 1999, at Tampa, Hillsborough County, Florida.

s/ Leonard J. Vernon
FOREPERSON

APPENDIX E — PER CURIAM ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DENYING PETITION FOR REHEARING DATED AND FILED OCTOBER 12, 2001

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 99-15330-GG

JERRY LIVINGSTON, as Guardian of Roger Lee Livingston, ROGER LEE LIVINGSTON, individually,

Plaintiffs-Appellants,

versus

LAWRENCE W. CROW, JR., Sheriff, of Polk County, in his official capacity, BRIAN WHIDDEN, EDWARD OTTE, BENNIE HAWLEY,

Defendants-Appellees.

No. 99-11699-GG

JERRY LIVINGSTON, as Guardian of Roger Lee Livingston,

Plaintiff-Appellee,

ROGER LEE LIVINGSTON, individually,

Plaintiff,

Appendix E

versus

LAWRENCE W. CROW, JR., Sheriff of Polk County, in his official capacity, BRIAN WHIDDEN, BENNIE HAWLEY,

Defendants,

EDWARD OTTE,

Defendant-Appellant.

On Appeal from the United States District Court for the Middle District of Florida

BEFORE: BLACK, and BARKETT, Circuit Judges, and TIDWELL*, District Judge.

PER CURIAM:

The petition for rehearing filed by Appellant, Edward Otte is DENIED.

ENTERED FOR THE COURT:

s/ [illegible]
UNITED STATES CIRCUIT JUDGE

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* Honorable G. Ernest Tidwell, U.S. District Judge for the Northern District of Georgia, sitting by designation.